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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of Infrastructure)
Sharing Provisions in the)
Telecommunications Act of 1996)

CC Docket No. 96-237

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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AT&T REPLY COMMENTS

Pursuant to Section 1.415(c) of the Commission's Rules, 47 C.F.R.

§ 1.415(c), AT&T Corp. ("AT&T") submits these reply comments on the proposals in the Commission's Notice of Proposed Rulemaking¹ for implementing new Section 259 of the Communications Act, the infrastructure sharing provision of the Telecommunications Act of 1996 ("1996 Act").²

Most commenters agree that the 1996 Act's definition of a "rural telephone company" offers an appropriate basis for identifying carriers that can be expected to lack economies of scale or scope, and that the Commission should therefore adopt a rebuttable presumption that a carrier that qualifies as a "rural telephone company" would meet the first criterion for a qualifying carrier

¹ Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, CC Docket No. 96-237, Notice of Proposed Rulemaking, FCC 96-456, released Nov. 22, 1996 ("NPRM").

² A list of the commenters and the abbreviations used to refer to each is appended as Attachment A.

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AT&T Corp.

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under Section 259(d)(1).³ Certain commenters disagree, however, with whether a determination of rural telephone company status should be applied at the holding company level. USTA argues that the Commission should assess whether a carrier lacks economies of scale or scope at the operating entity level because an operating company which is part of a larger holding company structure does not always have the economies of scale or scope to support advanced network capabilities for a particular set of customers.⁴

Establishing a rebuttable presumption, as supported by the majority of commenters, will address these concerns. Carriers that are affiliated with a well-financed, large company which has bargaining power with suppliers, access to diverse network systems and the ability to recoup their investments in infrastructure, technology and information from millions of customers will likely not require the sharing arrangement reserved for small carriers under Section 259.⁵ Indeed, the Rural Telephone Coalition admits that there may be

³ See, e.g., Ameritech at 7-8, ALLTEL at 2; BellSouth at 6-7, Castleberry Telephone Co., et al. at 2-3; Minnesota Independent Coalition at 2; National Cable Television Assoc. at 3; NYNEX at 18, Rural Telephone Coalition at 19, USTA at 12-13.

⁴ USTA at 13-14.

⁵ A Section 259 qualifying carrier may purchase service from the ILEC for the sole purpose of providing service "in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under Section 214(e)." Section 259(a). If the qualifying carrier chooses to provide service within the ILEC's own operating territory, then for this purpose, it would be eligible to purchase unbundled network elements or resold services from the ILEC under Section 251 on the same terms as all other competitive carriers. The

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circumstances where affiliated carriers could share infrastructure between themselves to increase their economies of scale.⁶ For example, companies such as those affiliated with the ALLTEL Service Corporation, those subsidiaries of which have over 1.5 million access lines nationwide and aggregate revenues of approximately \$1.2 billion,⁷ presumably will already have the resources and bargaining power necessary to accommodate their infrastructure needs.⁸ In other circumstances, if a non-qualifying carrier can show that a sharing arrangement with its affiliates for the services requested is economically unreasonable as contemplated under Section 259(b)(1), and that its economies of scale or scope would be greater if shared with the unaffiliated incumbent local exchange carrier ("ILEC"), the presumption can be reversed.

Which carriers will qualify under Section 259 will mean little, however, if the ILECs providing the facilities and services to qualifying carriers

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Commission should make clear that a qualifying carrier that obtains favorable rates, terms and conditions under a Section 259 sharing arrangement may not utilize that same arrangement within the ILEC's own serving area, to the disadvantage of competing carriers who are not eligible for such favorable terms.

⁶ RTC at 20. Accord GTE at 10.

⁷ USF 1996 Submission to FCC of 1995 Study Results, filed by the National Exchange Carrier Association, Oct. 1, 1996; ALLTEL 1994 Annual Report.

⁸ Accord NYNEX at 17 ("seemingly small companies may have economies by virtue of their affiliation with large holding companies").

are permitted to erect barriers to the practical use of their infrastructure.

Southwestern Bell ("SWBT") advocates such a barrier by arguing that each qualifying carrier must negotiate, pay for and secure a user license from the vendors of equipment, software and facilities which the ILEC uses in its network.⁹ SWBT claims that the Commission will disregard the legal obligations of the ILEC if it requires it to offer access to its network to an entity that does not have its own license.¹⁰

SWBT's argument is based on the spurious assumption that each qualifying carrier will control the ILEC's elements or functions in a manner that will allow the carrier to obtain access to the intellectual property embedded within them. Section 259, however, does not require the ILEC to relinquish control over its facilities. Indeed, Section 259(b)(2) states that the Commission may permit, but not require, the joint ownership or operation of network infrastructure. Should a qualifying carrier and an ILEC enter into a joint ownership arrangement, the parties should be left to negotiate any licensing requirements which arise as a result of joint control over the network element, which may entail nothing more than the qualifying carrier signing the same non-disclosure agreement with the vendor that the ILEC has signed. Absent such an arrangement, however, the qualifying carrier will purchase the use of the ILEC's

⁹ SWBT at 5-9. Accord Octel at 2-4.

¹⁰ SWBT at 7.

facilities and services -- in the same manner that carriers have historically done -- without acquiring access to embedded intellectual property.

To the extent that the qualifying carrier does not acquire an interest in the ILECs' embedded intellectual property through a joint ownership arrangement, Section 259(a) expressly mandates that ILECs are to enable a qualifying carrier to provide telecommunications service, or to provide access to information services in the carrier's service territory. Therefore, the ILEC is required to take the steps necessary to facilitate access to its services. Only the ILEC, which is the holder of the licenses and right-to-use agreements, not the qualifying carrier, possesses the essential information about its licenses and is in the best position to determine its legal obligations and to extract the approval it needs from the vendor regarding the qualifying carrier's use of the element in question.¹¹

If qualifying carriers were required to negotiate licensing agreements with all of an ILEC's equipment vendors, none of which have any incentive to negotiate reasonable terms or to act expeditiously with a small, rural carrier, it is reasonable to assume that the carrier's ability actually to use the ILEC's infrastructure to serve its customers will be seriously impeded.¹² These

¹¹ SWBT states that the ILECs' networks and overall businesses are built upon licenses to use intellectual property, thereby confirming the superior bargaining position of the ILECs as to their own intellectual property licenses. SWBT at 6-7.

¹² Even with large carriers, such as AT&T, the disadvantages of trying to replicate the licensing rights of the ILEC are manifest. For example, in the

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impediments could take the form of a delay in securing these license rights (which translate into a delay in provisioning service to its customers), and access to the ILEC's infrastructure on terms which are less beneficial than the ILEC has itself. Nothing prohibits the Commission from foreclosing these consequences by requiring the ILEC to secure any licensing arrangements which are necessary.¹³


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proceeding before the Public Utility Commission of Texas concerning the Section 251 interconnection agreement between AT&T and SWBT, SWBT identified a list of 78 licenses or right-to-use agreements applicable to its network elements, provided none of the relevant provisions in the agreements, and insisted that AT&T obtain authority from each supplier for all elements it intended to purchase from SWBT.

¹³ Although Section 259(b)(3) provides that ILECs will "not be treated by the Commission or any State as a common carrier for hire or as offering common carrier services with respect to any infrastructure, technology, information, facilities or function made available to a qualifying carrier," it is inherently reasonable to require that ILECs which enter into sharing agreements do so on non-discriminatory terms to ensure that the ILECs do not abuse their position to the detriment of similarly situated carriers. See NPRM at ¶ 22. This interpretation is supported by Section 259(b)(7) which requires ILECs to file tariffs or contracts showing the terms and conditions of their sharing arrangements.

WHEREFORE, for the reasons stated above and in AT&T's Comments, the Commission should adopt rules to implement Section 259 that are consistent with AT&T's recommendations.

Respectfully submitted,

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January 3, 1997

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Telecommunications Co., Inc., Mon-Cre Telephone Cooperative, Inc.,
New Hope Telephone Cooperative, Inc., Ragland Telephone Co., Inc.,
Blountsville Telephone Co., Inc., Bledsoe Telephone Cooperative,
Farmers Telephone Cooperative, Inc. ("Castleberry Telephone Co. et al")
Frontier Corporation ("Frontier")
GTE Service Corporation ("GTE")
MCI Telecommunications Corporation ("MCI")
Minnesota Independent Coalition
National Cable Television Association, Inc. ("NCTA")
National Rural Health Association ("NRHA")
The NYNEX Telephone Companies ("NYNEX")
Octel Communications Corporation ("Octel")
Oregon Public Utility Commission ("OPUC")
Pacific Telesis Group ("Pacific")
Rural Telephone Coalition ("RTC")
Southwestern Bell Telephone Company ("SWBT")
Sprint Corporation ("Sprint")
United States Telephone Association ("USTA")
U S WEST, Inc. ("U S WEST")

CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 3rd day of January, 1997, a copy of the foregoing "AT&T Reply Comments" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached Service List..


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